STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271930 Cass Circuit Court
AARON ALEXANDER WHITMAN, Defendant-Appellant.	LC No. 05-010460-FH

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant Aaron Alexander Whitman appeals as of right his jury trial convictions for one count of conspiracy to commit assault with intent to murder, MCL 750.157a, MCL 750.83; one count of carrying a firearm with unlawful intent, MCL 750.226; four counts of felonious assault, MCL 750.82; one count of intentionally discharging a firearm from a motor vehicle, MCL 750.234a; and eight counts of possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced to 6 to 10 years' imprisonment for conspiracy to commit assault with intent to murder; 2 to 5 years' imprisonment for carrying a firearm with unlawful intent; 2 to 4 years' imprisonment for each of the four felonious assault convictions and for his conviction of intentionally discharging a firearm from a motor vehicle; and two years' imprisonment for each of the eight counts of felony-firearm. We affirm.

Defendant first argues that the prosecutor did not present sufficient evidence from which a rational jury could find that he was present at the December 12, 2005 altercation in Lawless Park, which gave rise to his convictions. We disagree.

We review de novo claims of insufficient evidence**.** *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In so doing, we view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In all cases, the identity of a defendant as the perpetrator of a crime must be proven by the prosecution beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Circumstantial evidence, and reasonable inferences drawn from it, may be sufficient to prove the elements of a crime, including the identity of the perpetrator. *Id.; People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In the instant matter, the prosecutor presented a significant amount of circumstantial evidence, which supported an inference that defendant was one of the three assailants who attacked the victims in Lawless Park. The evidence included that: defendant left his stepfather's house with at least one of the other assailants shortly before the altercation; he was in a car that matched the descriptions given by the victims; he implicitly acknowledged to the police that he was at Lawless Park when the altercation occurred; his vehicle was intact at 11:00 p.m., but heavily damaged by 2:00 a.m.; he acknowledged that people he was unfamiliar with shattered the windows of his car; there were three assailants; and defendant was well acquainted with the other two. While defendant argues that his statement to the police alone does not establish his presence at the scene of the altercation, as mentioned above, defendant's statement was not the only evidence that supported an inference that he was present during the altercation. It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences**.** *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Therefore, after drawing all reasonable inferences in a light most favorable to the prosecution, we determine that the prosecutor presented sufficient evidence from which a rational jury could find that defendant was present during the altercation.

Defendant next argues that the prosecutor failed to present sufficient evidence to convict him, based on an aiding and abetting theory, of the assaults. We disagree.

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In Michigan, there is no distinction between principals and accessories for purposes of establishing culpability. MCL 767.39. To convict defendant under an aiding and abetting theory, the prosecutor was required to present evidence that; "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). The requisite intent to convict a defendant as an aider and abettor is the same intent necessary to convict the principal of the underlying crime. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

The evidence at trial supported that defendant was present during the assaults, and performed at least one act that allowed his co-defendants to commit the assaults. Specifically, he allowed them to travel to Lawless Park in his car. One of the victims testified that the two passengers of the red Dodge Neon each possessed baseball bats when they departed from the car, which supported an inference that, regardless whether defendant was the driver or a passenger, he was aware of the co-defendants' intent to assault the victims with a dangerous weapon. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Carines*, *supra* at 757-758. While defendant argues that the victims presented inconsistent stories at trial regarding the actions of the assailants during the altercation, all conflicts in the evidence must be resolved in favor of the prosecution when presented with a challenge to the sufficiency of the evidence. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant next argues that there was insufficient evidence presented at trial to establish that he conspired with the co-defendants to commit assault with intent to murder. We disagree.

As previously mentioned, we review de novo claims of insufficient evidence**.** *Lueth, supra* at 680. In so doing, we view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *Johnson, supra* at 723.

A conspiracy is a voluntary mutual agreement or understanding between two or more people to commit a criminal act. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993). The elements of conspiracy are: (1) defendant intended to combine with another person; and, (2) the participants intended to accomplish an illegal objective. *Mass, supra*, 464 Mich at 629. The prosecutor is required to prove that the parties "specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice* (*After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). A conspiracy is complete upon formation of the agreement; therefore, no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). A conspiracy may be proven by circumstantial evidence or based on inference. *Id.*

At trial, the prosecutor presented evidence that co-defendant Allen Hatton and one of the victims arranged a fight in Lawless Park, that defendant left his stepfather's house at 11:00 p.m. with Hatton and the one other man on the night of the fight, that the assailants traveled to the scene of the altercation together in defendant's car, that defendant's car contained at least one baseball bat and a shotgun before the incident, and that defendant was present during the subsequent altercation. The prosecutor also presented evidence that, while two of the assailants were attacking the victims with baseball bats, one of those two assailants yelled, "grab the gun," or "get the gun." Subsequently, one of the other assailants obtained a shotgun from the trunk of defendant's car, and began firing it at the victims.

Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *Justice, supra* at 347. Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). While defendant argues that the victims' descriptions of the assault could have given rise to an inference that only two of the assailants were involved in the assault, the prosecutor was not required to disprove every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant next argues that the trial court committed error requiring reversal when it allowed the prosecutor to call codefendant Hatton as a witness without first determining whether he was going to invoke his constitutional privilege to remain silent, and alternatively, that his trial counsel was ineffective for failing to object to defendant Hatton being called as a witness before the jury and insisting that the privilege be exercised outside the presence of the jury. Because the trial court's alleged error was not preserved by a contemporaneous objection and/or a request for a curative instruction, appellate review is for plain error. *Carines, supra* at 763-764. To avoid forfeiture of an unpreserved issue under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error must be plain; and, (3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of lower court proceedings. *Id.* "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the

defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant is correct that a lawyer may not intentionally call a witness knowing that the witness will claim a valid privilege and refuse to testify. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). However, nothing in the record supports that the prosecutor knew that Hatton would invoke the privilege. It could be argued, in fact that the prosecutor fully expected Hatton to testify, given that he was given immunity for his testimony at trial.

When called to testify, Hatton refused to answer questions about whether he knew defendant or his other codefendant. Defendant's stepfather previously testified that defendant resided at his house with Hatton, and the other co-defendant's girlfriend previously testified that defendant frequently spent time with Hatton and the other co-defendant. Thus, even if the jury assumed that Hatton's refusal to testify served as an implicit admission of the questions he was asked, the information sought by way of those questions was already established at trial. Therefore, defendant cannot show that any error was outcome determinative. *Carines, supra* at 763-764. In addition, because defendant cannot show on the record presented to this Court that, but for the alleged error of his trial counsel, the outcome would have been different, defendant cannot establish that he was denied the effective assistance of counsel. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray